



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: C&H Management, Inc.

File: B-221316.2

Date: September 9, 1986

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### DIGEST

1. Contrary to protester's unsupported assertions, solicitation provides clear definition of defective performance and details how much defective performance of each task constitutes unsatisfactory performance requiring a contract price deduction.
2. Provision in a solicitation which authorizes contract price deduction for value of unsatisfactorily performed tasks, monitored by random sampling and checklist, in proportion to the defective performance imposes a reasonable measure of damages.

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### DECISION

C&H Management, Inc. (C&H) protests allegedly defective specifications in invitation for bids (IFB) No. DABT39-86-B-0018, issued by the United States Army for custodial services at Fort Sill, Oklahoma. Specifically, C&H protests that the specifications concerning the criteria under which the government can make deductions for unsatisfactory performance are ambiguous and the solicitation imposes unfair monetary deductions for unsatisfactory performance.

We deny the protest.

Regarding C&H's complaint concerning the criteria for making deductions for unsatisfactory performance, the invitation incorporates by reference the standard Inspection of Services Clause contained in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.246-4 (1985). The clause generally must be included in all fixed-price service contracts. FAR, 48 C.F.R. § 46.304 (1985). It reserves the government's right to inspect all services, to the extent practicable, at all times during the term of the contract. The clause also provides that, when defects cannot be corrected by reperformance, the government may reduce the contract price to reflect the reduced value of the services performed.

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The IFB contains additional quality assurance provisions under the heading entitled "Performance Requirements Summary (PRS)." The PRS permits the government to monitor the contractor's performance by specified means of surveillance. There are two means of surveillance involved in this case. The first is random sampling of routine cleaning services (including, for example, floor maintenance, dusting, and trash removal), which the IFB states will be done using the concepts of Military Standard-Sampling Procedures and Tables for Inspection by Attributes, Apr. 29, 1963. Under this inspection procedure, inspection results attributable to a small randomly selected portion (sample) of a larger group (lot) of similar items (units) are attributed to all items in the larger group within a stated margin of error. The second means of surveillance involved here is checklist inspection of project cleaning tasks (including, for example, carpet and window cleaning and stripping and refinishing floors). Under this inspection procedure, periodic inspections conducted and observations and defects appearing in the relevant sample are tallied and compared to the acceptable number of defects.

The protester contends that the solicitation is ambiguous because it cannot be ascertained from the solicitation what the criteria are for determining defective performance and how much defective performance of any task constitutes unsatisfactory performance requiring a deduction. We believe, however, that the solicitation is clear on both of these matters. First, the solicitation provides a clear definition of what constitutes defective performance for each type of task covered by the solicitation. It states that routine work/tasks will be considered defective when the tasks in an area were not performed in accordance with the specifications or within the scheduled work shift. It further states that project work/tasks will be considered defective when the projects were not performed in accordance with the specifications or by the deadline specified in the specifications or were not completed in its entirety. These provisions are clear and C&H does not point to any solicitation provisions as support for its general statement that the solicitation is ambiguous in this regard.

As to the amount of unsatisfactory performance requiring a deduction, the PRS lists for each required service the acceptable quality level, that is the maximum degree of deviation permitted before the agency will determine the specific service to be unsatisfactory. Thus, the solicitation clearly indicates the percentage of defects allowed for services monitored by both random sampling and checklist before deductions will be taken.

We note that C&H's protest in this regard seems based on confusion about the propriety of random sampling and what constitutes the unit of inspection (the thing to be inspected to determine its classification as defective or nondefective), for implementing the quality assurance provisions. First, the random sampling method of monitoring performance of a task in an inspection unit is permissible. Since it is unreasonable to inspect all units 100 percent of the time, a random sampling plan which provides a statistically accurate surveillance plan is a practical means of ensuring compliance with the specifications. Environmental Aseptic Servs. Admin.--Request for Reconsideration, B-218487.3, Jan. 2, 1986, 86-1 CPD ¶ 1. We note that C&H has not made any showing that the random sampling plan is not statistically accurate.

As to what constitutes a unit of inspection for random sampling purposes, in considering a previous protest against the specifications in this solicitation, Environmental Aseptic Servs. Admin., B-221316, Mar. 18, 1986, 86-1 CPD ¶ 268, we determined that, reading the initial IFB in conjunction with the amendments, the unit to be inspected for determining defective performance is each particular task. Consequently, the various tasks performed in the areas to be inspected under the random sampling guide are checked and the number of defects found for each task is noted and the total number of defects is compared to the allowable number of defects for that particular task in order to determine whether a penalty should be imposed.

C&H also argues that the solicitation imposes unfair monetary deductions amounting to a prohibited penalty for unsatisfactory performance. It asserts that the Army has not provided any justification for taking deductions and that there is no logical relationship between the amounts to be deducted and the type of service for which the deductions are taken.

Liquidated damages are fixed amounts which the government can recover from the contractor upon proof of violation of the contract and without proof of the damages actually sustained. Environmental Aseptic Servs. Admin., 64 Comp. Gen. 54 (1984), 84-2 CPD ¶ 510. A rate for liquidated damages must be reasonable in light of the solicitation's requirements since liquidated damages fixed without reference to probable actual damages may be held to be a penalty and, therefore, unenforceable. FAR, 48 C.F.R. § 12.202(b) (1985).

We will review a protest alleging that a solicitation's liquidated damages provision imposes a penalty because any solicitation providing penalties for inadequate performance, in addition to violating applicable procurement regulations, can adversely affect competition and unnecessarily raise the government's costs. Environmental Aseptic Servs. Admin. and Larson Bldg. Care Inc., 62 Comp. Gen. 219 (1983), 83-1 CPD ¶ 194.

Before we will rule that liquidated damages provision imposes a penalty, however, the protester must show there is no possible relation between the amounts stipulated for liquidated damages and losses which are contemplated by the parties. See Massman Constr. Co., B-204196, June 25, 1982, 82-1 CPD ¶ 624. A protester who objects to a solicitation's deduction provision has a heavy burden. Sunrise Maintenance Sys., B-219763.2, Nov. 26, 1985, 85-2 CPD ¶ 603. It is the contracting agency that is most familiar with the conditions under which the services and supplies have been and will be used. Therefore, our Office will not question agency decisions concerning the best methods of accommodating their needs absent clear evidence that those decisions are arbitrary or otherwise unreasonable. Id.

The protester has not met this burden with regard to tasks inspected by random sampling or checklist, C&H merely suggests that the solicitation provisions permit deductions for unsatisfactory performance of a task which do not reflect the value of the task being performed. We disagree. The deduction formula for the unsatisfactory performance of tasks which are subject to these inspection procedures based on the contract price for the task in question and is such that the amount deducted will be proportionate to the value of the task. The deduction formula provides that if the quality of completed work is unsatisfactory, that is, the acceptable quality level is exceeded, the contract price for that bid item is multiplied by the specified deduction percentage (the amount of the total contract price attributable to that task) and that amount is then multiplied by the percentage of the sample which is deemed unsatisfactory to reach the defective deduction. For example, floor maintenance constitutes 10 percent of the contract price and therefore the maximum deduction for unsatisfactory performance of the task is 10 percent of the contract price. Such a deduction, however, would only be made if 100 percent of the sample is found defective. Otherwise, the amount deducted will be proportionate to the defective performance of that task; if half of the floor maintenance sample is deemed unsatisfactory, the amount deducted is half of the contract price for that task. Thus, the deduction is related to the contract price for the particular task involved and will vary

with the percentage of the sample which is unsatisfactory. We conclude, therefore, that this deduction formula provides for a reasonable measure of damages.

Finally, in connection with C&H's complaint that the monetary deduction scheme under the solicitation is unfair, the implementation of a valid payment deduction system for deficient performance is a matter of contract administration, not for review by this Office. Starlite Servs., Inc., B-219418, Oct. 15, 1985, 85-2 CPD ¶ 410.

The protest is denied.

for *Seymour S. Fine*  
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General Counsel